



Renewable Energy Development *in Saskatchewan*



MCKERCHER LLP

MCKERCHER LLP BARRISTERS & SOLICITORS

SASKATOON

374 Third Avenue South
Saskatoon, SK S7K 1M5
(306) 653-2000 F (306) 653-2669

REGINA

800 - 1801 Hamilton Street
Regina, SK S4P 4B4
(306) 565-6500 F (306) 565-6565

**A MCKERCHER LLP OVERVIEW
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Approximately 2,400 megawatts of renewable source energy will be developed in Saskatchewan in the next 13 years.

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ABOUT THE AUTHOR

Christopher J. Masich is a senior associate in the Saskatoon McKercher LLP office where he maintains a project development and commercial transactions practice with particular emphasis on Energy, Natural Resources, Agriculture and Environment.

Christopher has assisted clients with matters relating directly to energy development in Saskatchewan, including land acquisitions, regulatory compliance, environmental compliance and SaskPower procurement.

Christopher J. Masich
Senior Associate, McKercher LLP
306-664-1356
c.masich@mkercher.ca

ABOUT MCKERCHER LLP

For 90 years McKercher LLP has been providing client-focused legal services to Saskatchewan. As a full-service law firm with offices in Saskatoon and Regina, we are proud to have been involved in many of the significant projects, cases and matters that have shaped our communities into what they are today. We are excited for the future and for the new opportunities that it brings to work with our clients and to assist them in positioning Saskatchewan for success. Our commitment is to work with our clients to find preventative and proactive solutions to their legal challenges.

In the energy sector, McKercher acts as counsel to large and small-scale clients seeking advice on procurement, regulatory and environmental compliance, risk mitigation and general commercial matters. Our Energy, Resources and Environment practice group has developed a comprehensive due diligence checklist and regularly provides advice to clients regarding regulatory requirements in the energy potash industry. We have extensive experience in the Saskatchewan and Federal environmental regulatory regime, which experience is derived from our work with the diverse industries operating in our Province. We also have developed a deep understanding of the complex legal issues impacting First Nation governance and business operations. Our firm has represented First Nations around the province, particularly in litigation regarding specific claims, taxation, education, health and employment law. We also assist with jurisdictional issues in negotiations with all levels of government.

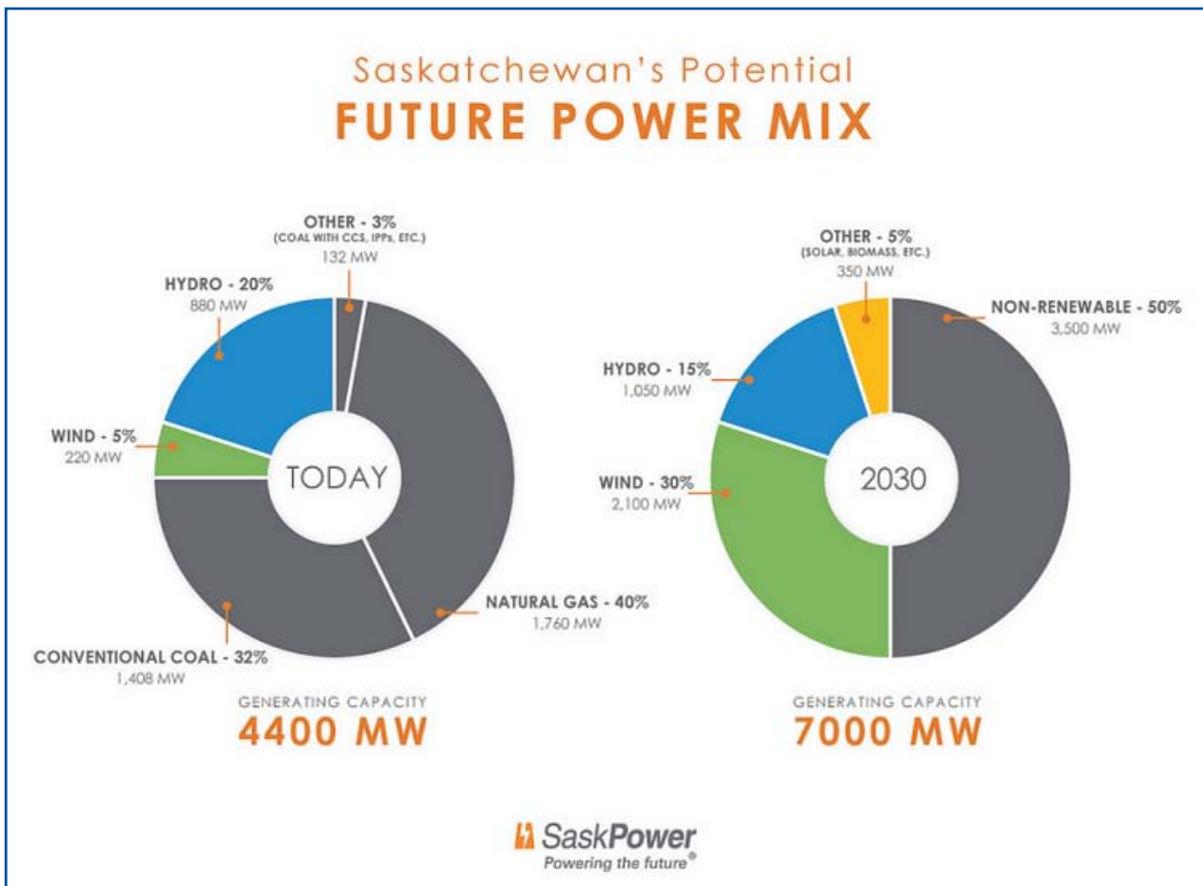
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INTRODUCTION

Saskatchewan Power Corporation (SaskPower) recently announced a target of 50% power generation capacity from renewable sources by 2030. At current power generation capacities, approximately 2,400 megawatts (MWs) of renewable source energy will be developed in Saskatchewan in the next 13 years. SaskPower has reported that its long-term power generation capacity goals include the addition of 1,600 MWs of wind-based energy, 300 MWs of hydro-based energy and 100 to 300 MWs of solar, biomass and other renewable source energy each by 2030.

SaskPower has also reported procurement of wind projects in the 100 – 200 MW size and solar in the 10 – 20 MW size. At these project sizes, at least 13 renewable source projects (but likely more) are expected to be developed in Saskatchewan before 2030. Fortunately, with Saskatchewan’s abundance of renewable sources – wind, solar, hydro, geothermal and biomass – and the participation of independent power producers, SaskPower’s announced targets are achievable.



Source: SaskPower¹

¹ www.saskpower.com

In the wake of SaskPower's announcements, McKercher LLP has expectedly seen a rise in national and international renewable energy project developers seeking legal and business advice related to the Saskatchewan electricity market. McKercher LLP has prepared this *Overview of Renewable Energy Development in Saskatchewan* to assist renewable energy developers and other industry participants in understanding the legal and regulatory landscape for development of renewable energy projects in Saskatchewan.

Beginning with an overview of the exclusivity granted to SaskPower, this *Overview of Renewable Energy Development in Saskatchewan* will identify legal and regulatory issues relating to:

- obtaining power purchase agreements or public-private partnerships through competitive procurement or unsolicited single source procurement with SaskPower or the First Nations Power Authority;
- private, Crown and First Nation land acquisitions in Saskatchewan;
- pre-development regulatory considerations, including *The Environmental Assessment Act* and the *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects*; and
- development regulatory considerations, including compliance with municipal development and zoning regulations.

McKercher LLP intends that this *Overview of Renewable Energy Development in Saskatchewan* will provide stakeholders with insight into Saskatchewan's legal and regulatory landscape as it relates to renewable energy development. Early understanding of Saskatchewan's legal and regulatory landscape will ensure that renewable energy projects can be assessed, permitted, approved, constructed and operated without undue delay, minimizing litigation risk and in a responsible and sustainable manner.



SASKATCHEWAN POWER CORPORATION

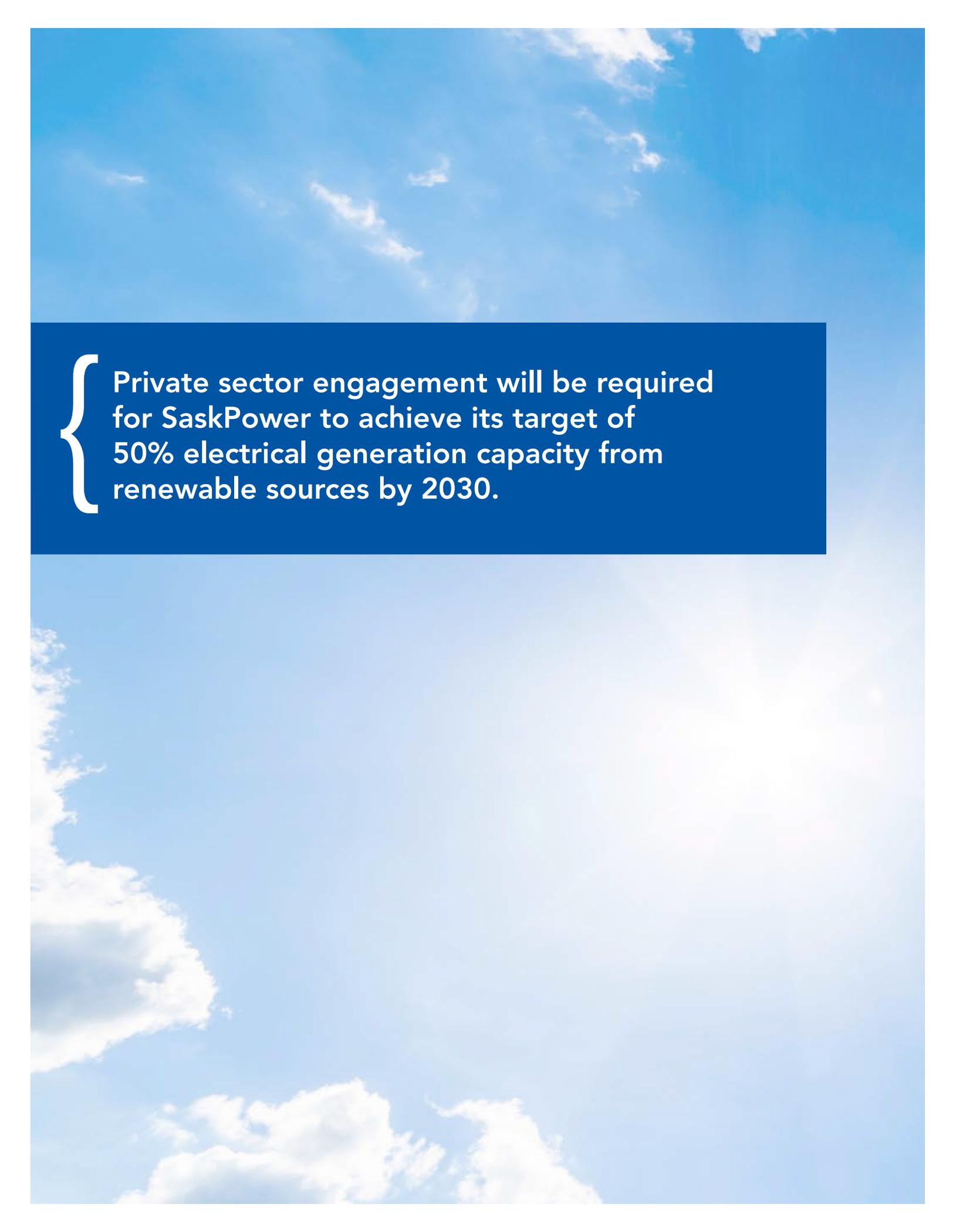


SASKPOWER'S EXCLUSIVITY IN SASKATCHEWAN

Except for historical exceptions unique to Saskatchewan's early settlement history, pursuant to *The Power Corporation Act*, SaskPower maintains an exclusive monopoly over the supply, transmission, distribution and sale of electrical energy in Saskatchewan. Notwithstanding such exclusivity, approximately one-quarter of Saskatchewan's electrical generation capacity is supplied by independent power producers pursuant to a power purchase agreement or a form of public-private partnership and this generation volume is expected to grow. SaskPower's current generation capacity is 4,437 MWs of which 3,542 MWs is generated by SaskPower-owned facilities and the remaining 895 MWs is supplied through standing offer, self-generation programs or procured from independent power producers.

By *The Power Corporation Act*, SaskPower may, on any terms and conditions that

SaskPower considers advisable, consent to the supply, transmission, distribution or sale of electrical energy by or to a person or category of persons. On a number of projects SaskPower has engaged independent power producers to generate and supply renewable source energy – for example, the Sunbridge Wind Power Facility and the Red Lily Wind Power Facility. SaskPower is actively working to improve its procurement processes including development of long-term strategic sourcing partnerships and enhanced supplier relationship management. As part of the procurement process, SaskPower is reportedly putting more emphasis on value rather than cost when scoring proposals recognizes the advantages to be gained by leveraging the skills, expertise and resources of the private sector. By utilizing contractual, partnership and joint venture relationships, SaskPower is actively seeking private sector participation to meet Saskatchewan's power needs.

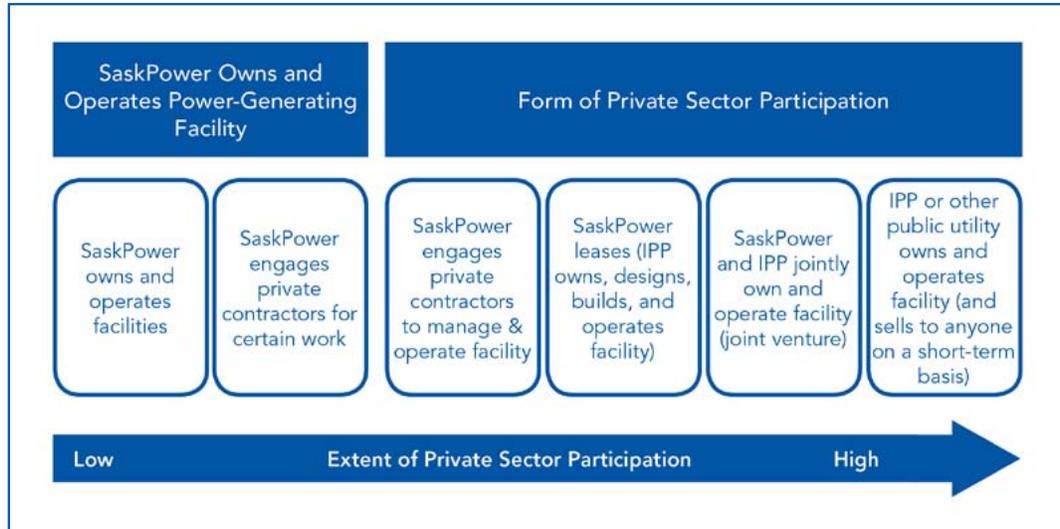


{ Private sector engagement will be required for SaskPower to achieve its target of 50% electrical generation capacity from renewable sources by 2030.

OBTAINING A POWER PURCHASE AGREEMENT OR PUBLIC PRIVATE PARTNERSHIP

Private sector engagement will be required for SaskPower to achieve its target of 50% electrical generation capacity from renewable sources by 2030. In Saskatchewan the level of private sector engagement varies significantly. To date, SaskPower has managed its electrical supply, transmission, distribution and sale on a

spectrum that ranges from SaskPower wholly owning and operating a facility without any private sector engagement to an independent power producer wholly owning and operating a facility and selling to SaskPower pursuant to a power purchase agreement.



Source: Adapted from Saskatchewan Provincial Auditor 2015 Report - Volume 1²

Except for standing offer, self-generation programs, which are limited in electrical generation capacity, the vast majority of Saskatchewan electrical generation capacity is either generated by SaskPower or procured by SaskPower from independent power producers. For electrical generation capacity by independent power producers, power purchase agreements or public-private partnerships may be obtained in one of three ways:

1. competitive procurement initiated by SaskPower;
2. unsolicited single source procurement initiated by an independent power producer; or
3. the First Nations Power Authority.

In 2014, 91% of all SaskPower's procurement was obtained through competitive procurement and in 2015 82% was obtained through the competitive procurement while only 9% and 18% was obtained through unsolicited single source procurement.

SaskPower Competitive Versus Single Source Procurement (%)				
	Competitive Twelve Months December 31, 2014	Single Source Twelve Months December 31, 2014	Competitive Twelve Months December 31, 2015	Single Source Twelve Months December 31, 2015
Target	75.0	25.0	85.0	15.0
Actual	91.0	9.0	82.0	18.0

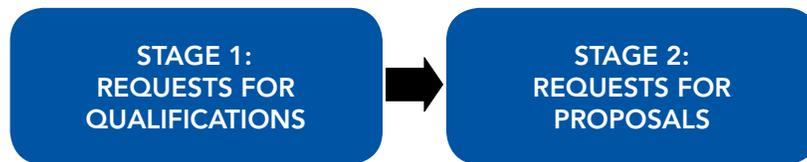
Source: Adapted from SaskPower 2015-16 Annual Report³

² auditor.sk.ca

³ www.saskpower.com

Competitive Procurement

For electrical generation by independent power producers, SaskPower uses a two-stage process management framework for its competitive procurement:



Stage 1 Request for Qualifications (RFQ) is intended to permit SaskPower to assess the experience, financial ability and other project-specific attributes of the independent power producer to develop, own and operate an electrical generation facility as intended under the power purchase agreement or public-private partnership structure. At this stage SaskPower will customarily:

- establish proponent financial and project technical criteria (for example: project structure, type of power generation, generation standards, generation amount, minimal financial requirements, etc.);
- set submission timelines and protocols;
- form the RFQ evaluation committee, which will include individuals within SaskPower's applicable departments, a representative of the Crown Investments Corporations and an external expert;
- engage the evaluation committee to assess and evaluate independent power producer proposals; and
- appoint a fairness advisor to review SaskPower's management of the procurement process and attest to its fairness.

At Stage 2 Request for Proposals (RFP) SaskPower will customarily:

- establish proponent financial and project technical criteria consistent with Stage 1 RFQ;
- limit participation in the RFP to those independent power producers that met the evaluation standards set at Stage 1 RFQ;
- form necessary evaluation committees consisting of SaskPower personal and external experts composed as required given the specifics of the RFP;
- engage the evaluation committee to assess and evaluate independent power producer proposals; and
- conclude the evaluation and make a final selection, which may include awarding the RFP to itself.

Unsolicited Single Source Procurement

SaskPower's use of unsolicited single source procurement is usually limited to unique opportunities or time-sensitive situations. Independent power producers seeking to obtain a power purchase agreement or a public-private partnership must ensure that the proposal does not come within a current or planned SaskPower program or competitive procurement. Unsolicited proposals are also expected to be a long-term project spanning several years. Additionally, an unsolicited proposal should not be for project development which has customarily been procured by SaskPower through the competitive process – for example the Swift Current CCGT Project or the Chaplin Wind Project.

SaskPower deploys a 3 stage process to manage unsolicited single source procurement opportunities:



At Stage 1 Application, SaskPower will require an independent power producer to submit an application for the proposed development. SaskPower will form an executive steering committee to assess the application to ensure that the proposal is not of the type that SaskPower customarily solicits through its competitive procurement process. If an independent power producer satisfies the requirements of Stage 1 Application, Stage 2 Detailed Proposal will require the independent power producer to provide a detailed evaluation of the project structure, type of power generation, generation standards, generation amount, costs and expenses and interconnection studies. Additionally, independent power producers should be prepared to justify why competitive procurement should be forgone and assist SaskPower in managing its risks when engaging in single source procurement – such as increased costs and unfair or the appearance of unfair treatment.

First Nations Power Authority

First Nations Power Authority Inc. is a Saskatchewan non-profit corporation created for the purpose of facilitating independent power generation projects directly benefiting Saskatchewan First Nations. First Nations Power Authority works with SaskPower to define mutually agreeable opportunities for “Eligible First Nations Projects” brought forward by “Eligible First Nations Entities”. First Nations Power Authority is conduit and liaison between Saskatchewan First Nations, industry proponents and SaskPower, which allows for proposals to enter into a power purchase agreement with SaskPower other than through competitive procurement or single source procurement processes

summarized above. Proposals put forward through the First Nations Power Authority may be either solicited or unsolicited, but must meet the requirements set forth in the First Nations Power Master Agreement between SaskPower and First Nations Power Authority.

There are numerous ways that an industry proponent and a Saskatchewan First Nation can structure an “Eligible First Nation Entity” and an “Eligible First Nation Project”. These terms are established by the First Nations Power Master Agreement between SaskPower and First Nations Power Authority and early-stage planning is necessary. No matter the structure, in general terms, the project must either be owned and developed by an “Eligible First Nation Entity” or be located on a “First Nation Reserve”. In either case, the project will also require a “First Nation Opportunity Agreement” which will establish the terms related to the project. Once the First Nation Opportunity Agreement is concluded, SaskPower and the participating parties will negotiate customary agreements – such as a power purchase agreement and interconnection agreement. Negotiation of these agreements is inclusive of competitive pricing, dispatch rights and net off-taker rights.

Until such time that First Nation Opportunity Agreement is established, there is no binding commitment or agreement from SaskPower relating to a project. Proposals put through the First Nations Power Authority are given timely attention and expedited considerations with a view to whether or not a First Nations Opportunity Agreement will be negotiated and ultimately entered. These agreements are finalized with the usual negotiating rigor as well as added political agendas on each side.

GENERAL RISK ALLOCATION CONSIDERATIONS

No matter the process used to obtain a power purchase agreement or public-private partnership, independent power producers will negotiate the terms and conditions of the power purchase agreement or other agreements and allocate risk in accordance with each party's mitigation strategies and risk tolerance. While each situation will be factually unique, independent power producers and SaskPower will at a minimum engage in risk allocation relating to:

- development risks inclusive of financing, permitting, constructing and operating the project;
- technical risks inclusive of the technology underlying the project;
- operational risks including the available and reliability of the source to fuel electrical generation;
- long term capacity for independent power producer to deliver and meet its obligations under the agreement; and
- allocation of costs and expenses.

ABORIGINAL PROCUREMENT

SaskPower's Aboriginal procurement initiative was officially established in 2015 wherein SaskPower seeks to:

- promote positive relations with Saskatchewan Aboriginal people, communities and businesses;
- involve Aboriginal people in economic opportunities and growth;
- procure goods and services, and promote a participate in viable procurement opportunities for Aboriginal businesses;
- consider the role of Aboriginal businesses in procurement opportunities for SaskPower power generation and transmission projects.

For SaskPower's competitive procurements there usually are evaluation points reserved for Aboriginal ownership and Aboriginal participation in project development. Similarly, in the context of unsolicited single source procurement Aboriginal ownership and Aboriginal participation will likely be sufficiently unique to permit SaskPower to peruse single source procurement for project development.



NEW WEST TRADE PARTNERSHIP AGREEMENT AND AGREEMENT ON INTERNAL TRADE

The New West Partnership Trade Agreement (NWPTA) and the Agreement on Internal Trade (AIT) impact on SaskPower procurement. The AIT is a multilateral agreement between the provinces and territories of Canada entered into in 1995 for the purpose of increasing investment, labour mobility and government procurement opportunities. The AIT permits the formation of “trade enhancement arrangements” that liberalize trade in certain regions beyond the level set out in the AIT. Pursuant to this provision, Alberta and British Columbia entered into the Trade, Investment and Labour Mobility Agreement in April 2009, which was succeeded by the NWPTA in July

2010 when Saskatchewan signed on to the agreement.

The primary goal of the NWPTA and AIT is to open government procurement opportunities to out-of-province contractors. This covers all forms of government procurement entities, including ministries, crown corporations, municipalities and smaller agencies such as school boards and health authorities. However, in the context of renewable energy, it is important to note exceptions to the NWPTA and AIT. Measures adopted or maintained to promote renewable and alternative source energy are exempt.





Of the established and proposed wind projects in Saskatchewan to date, the Chaplin Wind Project was the only project determined by the Saskatchewan Ministry of Environment to be a development requiring environmental assessment.

PRE-DEVELOPMENT CONSIDERATIONS



LAND ACQUISITIONS

Crown Land

Pursuant to *The Provincial Lands Act* and *The Provincial Lands Regulations* the Saskatchewan Minister of Agriculture may, upon any terms and subject to any conditions that the Minister considers advisable, lease provincial lands and issue permits for the use of unoccupied provincial lands. By *The Provincial Lands Act* the term of a lease of provincial lands may not exceed 47 years unless the Lieutenant Governor in Council specifically authorizes the granting of a lease, or a class of leases, for a longer term. Notwithstanding the legislated maximum term, in practice the Saskatchewan Ministry of Agriculture has generally limited wind leases to 10 year terms without a contractual right of renewal. In limited instances, applicants have obtained leases with 25 year terms without a contractual right of renewal. Similar to leases used in acquiring private land, a typical lease of provincial land will provide a royalty-based rent formula, as well as compensation for

electrical collection and distribution systems, access roads and other customary land based compensation.

Additionally, the Saskatchewan Ministry of Agriculture has established a *Wind Power Surface Lease Policy* which provides guidance on obtaining a "surface lease" or exploration permit within an existing Crown agriculture lease. *Wind Power Surface Lease Policy* provides the procedures to be followed to obtain an exploration permit or surface lease and establishes a compensation structure and rental reduction for the agricultural lessee. The *Wind Power Surface Lease Policy* also provides that if an agricultural lessee does not consent to entry onto the leased land, the Saskatchewan Ministry of Agriculture will endeavour to mediate the situation to the mutual satisfaction of both parties, however, the Ministry may grant permission to enter after establishing requirements based on the legitimate concerns of the agricultural lessee.

Private Land

Acquisition of private land is negotiated between the independent power producers and the landowner sometimes with the assistance of a firm providing Landman services in Saskatchewan. In the context of renewable energy, rights in private land are customarily acquired by lease or option to lease with rents calculated in accordance with the phase of development. The leases also compensate for other disruption caused to the land. Special consideration will be



required to ensure that the instrument securing rights in private land complies with applicable Saskatchewan legislation, including: *The Planning and Development Act, 2007*, *The Saskatchewan Farm Security Act*, *The Environmental Management and Protection Act, 2010*, *The Homesteads Act*,

1989 and *The Family Property Act*, among other legislation. Page 18 of this [Overview of Renewable Energy Development in Saskatchewan](#) sets out in further detail certain considerations raised by *The Saskatchewan Farm Security Act* and *The Planning and Development Act, 2007*.

First Nations Land

Renewable energy development on First Nations land provides unique opportunities in Saskatchewan. Ascertaining the necessary rights in land will be highly dependent upon several factors including applicable legislation, the involvement of the First Nation and the structure of the renewable energy project. Notwithstanding the project-specific nuances to development on first nations land, this [Overview of Renewable Energy Development in Saskatchewan](#) provides the general First Nation land framework in Saskatchewan.

In Saskatchewan as well other provinces, First Nations land may be governed by either the *Indian Act* or the *First Nations Land Management Act*. In either case the governing document setting out the relationship between a proponent and the First Nation will be a lease which can also be used as security for any loan that the First Nation may require. Generally speaking, a First Nation who is a signatory to the First Nation Land Management Act will be able to immediately engage or participate in a project subject to the terms of the First Nation's Land Code. A First Nation who is still governed by the Indian Act will require some lead time to obtain the necessary approvals from the Minister Indian and Northern Affairs Canada.

SASKATCHEWAN LAND USE PLANS, PLANNING DESIGNATIONS AND BIOLOGICAL FEATURES

The Environmental Assessment Act

The Environmental Assessment Act outlines the processes and guidelines for obtaining ministerial approval of a “development” and is administered by the Saskatchewan Ministry of Environment - Environmental Assessment Branch. The application of ***The Environmental Assessment Act*** is dependent upon whether the project is a “development” which is defined as any project, operation or activity, or any alteration or expansion of any project, operation or activity, which is likely to:

- (i) have an effect on any unique, rare or endangered feature of the environment;
- (ii) substantially utilize any provincial resource, and in doing so, preempt the use, or potential use of that resource for any other purpose;
- (iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
- (iv) cause widespread public concern because of potential environmental changes;
- (v) involve a new technology that is concerned with resource utilization and that may induce significant

environmental change; or

- (vi) have a significant impact on the environment or necessitate a further development, which is likely to have a significant impact on the environment.

The Saskatchewan Ministry of Environment established ***Technical Proposal Guidelines*** and recently the ***Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects*** to assist proponents making a determination whether there is a legal obligation to seek ministerial approval under ***The Environmental Assessment Act***. Of the established and proposed wind projects in Saskatchewan to date, the Chaplin Wind Project was the only project determined by the Saskatchewan Ministry of Environment to be a development requiring environmental assessment. Accordingly, early-stage planning and proactive self-assessment to minimize environmental impacts can minimize project costs and timelines. Obtaining a ministerial decision as to whether a project is a development and, if applicable, obtaining ministerial approval to proceed with a development may be a multi-year process. For example, the Chaplin Wind Project from the time of submission of a technical proposal to the Saskatchewan Minister of Environment denying to grant ministerial approval was approximately 4 years.

The *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects* were released September 2016 as a planning and decision-support tool to assist proponents with regulatory compliance under the following legislation, as applicable:

- *The Environmental Management and Protection Act, 2010;*
- *The Environmental Assessment Act;*
- *The Wildlife Habitat Protection Act;*
- *The Water Security Agency Act;*
- *Canadian Environmental Protection Act;*
- *Canadian Environmental Assessment Act;*
- *Canada Wildlife Act;*
- *Migratory Birds Convention Act;*
- *Species At Risk Act;* and
- *Fisheries Act.*

It is important to note that the *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects* do not relieve a proponents obligations under applicable legislation. Independent power producers must comply with all applicable legislation and any ministry or other regulatory agency may exercise powers of enforcement for non-compliance. The *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects* are intended to assist proponents to avoid preventable impacts on wildlife habitat, birds, bats and other biodiversity by establishing avoidance zones where the risk of ecological impact or public concern is believed to be high.



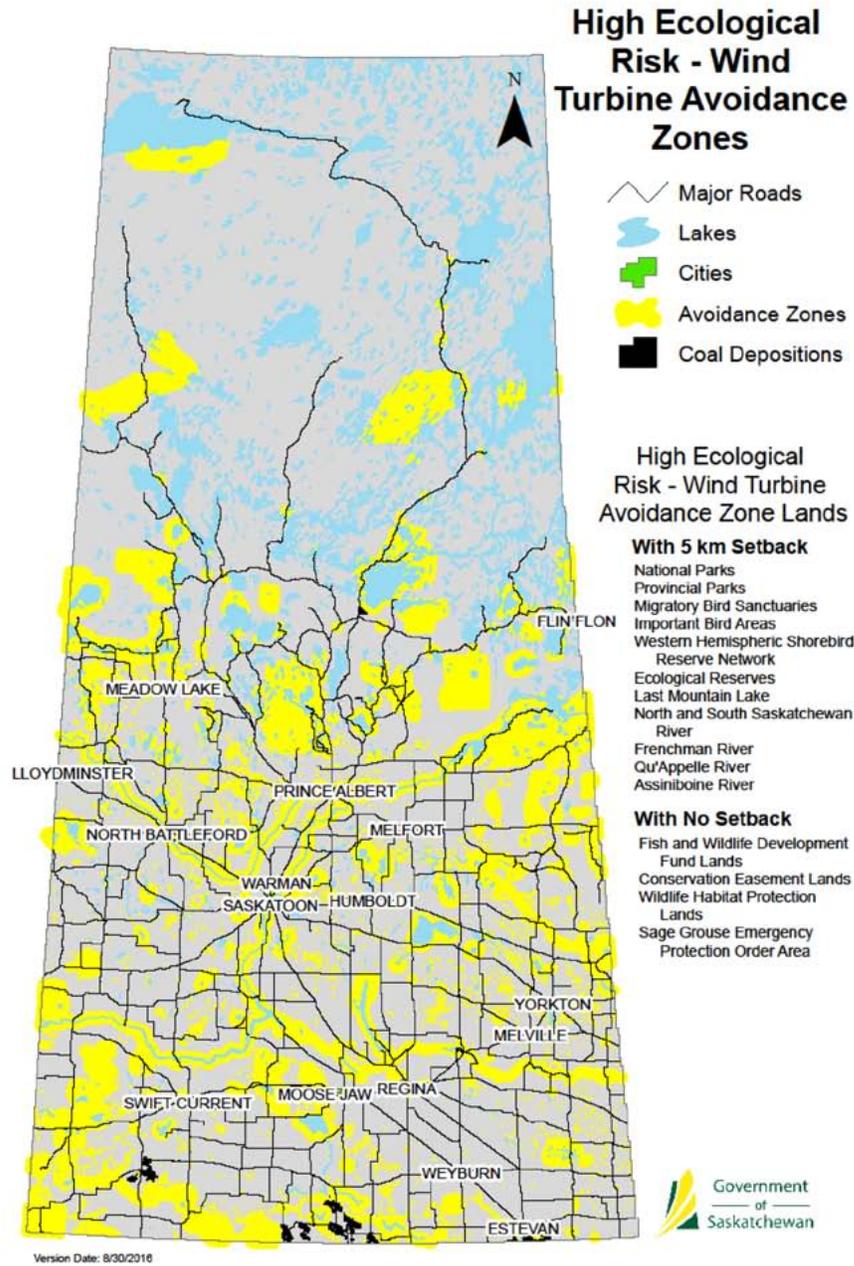
The following table identifies and summarizes avoidance zones established under the *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects* that include a five kilometer setback:

Avoidance Zones with 5 km Buffer Zone	
Avoidance Zone	Overview
National Parks	Saskatchewan has two national parks - Prince Albert National Park, located in central Saskatchewan and Grasslands National Park, located in southern Saskatchewan.
Provincial Parks	There are 194 separate, legally designated park lands located throughout Saskatchewan comprising 1.25 million hectares. Different classifications under <i>The Parks Act, 1986</i> outline different purposes for these lands, including wilderness parks, historic parks, recreation parks, recreation sites and protected areas.
Last Mountain Lake National Wildlife Area and Last Mountain Lake	Last Mountain Lake National Wildlife Area was the First National Wildlife Area established under the <i>Canada Wildlife Act</i> . Last Mountain Lake National Wildlife Area and Last Mountain Lake cover in excess of 10,905 hectares located Southern Saskatchewan.
Important Bird Areas	There are 53 Important Bird Areas in Saskatchewan. Important Bird Area do not receive legislative protection in Saskatchewan but pursuant to the <i>Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects</i> are designated as avoidance zones, including 5 km buffer zone.
Western Hemispheric Shorebird Reserve Network sites	There are 3 Western Hemispheric Shorebird Reserve Network sites in Saskatchewan. Western Hemispheric Shorebird Reserve Network sites do not receive legislative protection in Saskatchewan but pursuant to the <i>Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects</i> are designated as avoidance zones, including 5 km buffer zone. The 3 Western Hemispheric Shorebird Reserve Network sites in Saskatchewan are: Quill Lakes, Last Mountain Lake, Chaplin/Old Wives/Reed Lakes.
Ecological Reserves	Pursuant to <i>The Ecological Reserves Act</i> and <i>The Representative Area Ecological Reserve Regulations</i> the Saskatchewan government has established the Saskatchewan Representative Areas Network to preserve natural and culturally significant land for the preservation ecological resources, maintenance of the integrity of biologically diverse areas, protection of habitat for wildlife, preservation of areas of high scenic value and unique physical features, and provision of recreational, educational and research opportunities. Representative areas are managed under concept management plans established by the Saskatchewan Ministry of Environment and have been published for: Amisk Lake, Budd Lake, Caribou Flats, Haldorson Bay, Jan Lake, Mari Lake, McCusker River and Primrose Lake, Perry Lake, Seager Wheeler Lake, Selenite Point, Sturgeon Weir Lake, Taiga Shield, Pasquia-Porcupine Region and Wapawekka Hills.
Significant Saskatchewan Water Bodies	Each of Last Mountain Lake, North Saskatchewan River, South Saskatchewan River, Frenchman River, Qu'Appelle River and Assiniboine River are designated as avoidance zones, including 5 km buffer zone.

The following table identifies and summarizes avoidance zones established under the *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects* that do not have a prescribed setback:

Avoidance Zones without 5 km Buffer Zone	
Avoidance Zone	Overview
Fish and Wildlife Development Fund (FWDF) lands	The Fish and Wildlife Development Fund is preservation fund established by the Saskatchewan Ministry of Parks, Culture and Sport for the benefit of fish and wildlife management for purposes related to angling, hunting and trapping. Approximately 225,538 acres of land is owned by Her Majesty the Queen (Saskatchewan) for the benefit Fish and Wildlife Development Fund throughout Saskatchewan.
Conservation easements	Pursuant to <i>The Conservation Easement Act</i> conservation easements can be established between private landowners and the approved organizations such as Ducks Unlimited Canada, Saskatchewan Wildlife Federation, Saskatchewan Ministry of Environment or other governmental authorities. A conservation easement is registered against the affected titles in the Saskatchewan Land Titles Registry.
The Wildlife Habitat Protection Act lands	Pursuant to <i>The Wildlife Habitat Protection Act</i> the Saskatchewan Minister of Environment may designate Crown lands as wildlife habitat and ecological lands. Wildlife habitat and ecological lands are designated by The Wildlife Habitat and Ecological Lands Designation Regulations.
Critical habitat for species at risk	Critical habitat is the habitat necessary for the survival or recovery of a listed endangered, threatened or extirpated species in Schedule 1 of <i>Species At Risk Act</i> . Critical habitat will be identified in the recovery strategy or action plan for each listed species and posted on the SARA Public Registry.
National Wildlife Area Lands (other than Last Mountain Lake National Wildlife Area)	In Saskatchewan there are 8 National Wildlife Areas established under the <i>Canada Wildlife Act</i> – St. Denis, Bradwell, Stalwart, Tway, Prairie, Webb, Raven Island and Last Mountain Lake. It is important to note that only Last Mountain Lake has an additional 5 km buffer.

If a renewable energy project is in the vicinity of an avoidance zone, consultation with Saskatchewan Ministry of Environment, together with any governing bodies responsible for the applicable avoidance zone, is recommended. The following map highlights in yellow avoidance zones established by *Wildlife Siting Guidelines for Saskatchewan Wind Energy Projects*.



² Detailed avoidance zone map data can be requested from Ministry of Environment, Environmental Assessment and Stewardship Branch

Legal and Regulatory Issues

The Saskatchewan Farm Security Act

Independent power producers acquiring rights in Saskatchewan farm land for a renewable energy project development, including any interest in farm land held under a lease or any other agreement that may directly or indirectly result in vesting of title to farm land, confer the right to possession of farm land or confer any right or control ordinarily accruing to the owner of farm land, should be mindful of the non-Canadian ownership restrictions in ***The Saskatchewan Farm Security Act***.

The Saskatchewan Farm Security Act

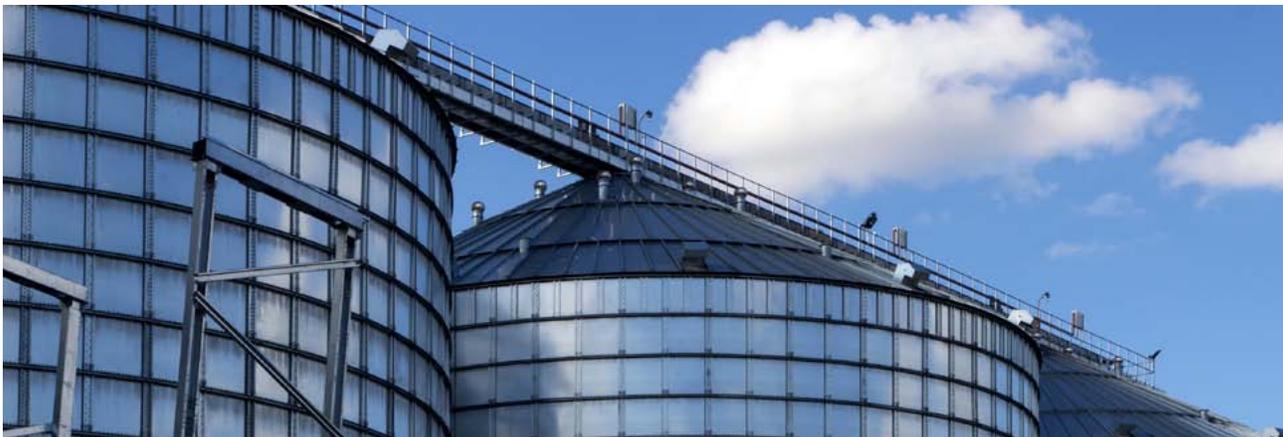
prohibits non-Canadian-owned entities from acquiring an aggregate land holding in excess of 10 acres. A non-Canadian-owned entity is a person or other entity or that is not a Canadian-owned entity or any entity that has shares listed on an exchange. A Canadian-owned entity is a corporation or any other entity in which all the shares or interests are legally and beneficially owned, and all the memberships are held, by resident persons or other Canadian-owned entities. To determine if an entity is a Canadian-owned entity or non-Canadian-owned entity requires review of all ownership interests until one arrives at individual ownership. ***The Saskatchewan Farm Security Act*** also includes express provisions relating to trusts. If an independent power producer's legal structure includes trusts careful analysis is required to ensure

compliance with ***The Saskatchewan Farm Security Act***.

If it is determined that an independent power producer is a non-Canadian-owned entity or is otherwise prohibited from acquiring a land holding, exemptions are available and frequently granted in relation to energy development and other resource sector developments.

The Planning and Development Act, 2007

Independent power producers acquiring rights in Saskatchewan farm land for renewable energy project developments should be mindful of the subdivision restrictions in ***The Planning and Development Act, 2007***. Leases, option to lease or other instruments commonly used to acquire rights in land may be a "subdividing instrument" for the purposes of ***The Planning and Development Act, 2007*** and require approval from the Saskatchewan Director of Community Planning. There are several exemptions to the requirement to obtain approval of the Saskatchewan Director of Community Planning, however, none are generally suitable for renewable energy development. Accordingly, special drafting consideration is required to ensure the leases, options to lease or other instruments are not subdividing instruments, Failure to consider ***The Planning and Development Act, 2007***, may result in the leases, option to lease or other instrument being declared invalid.



The Land Titles Act, 2000, Easements and Expropriation

Leases, options to lease or other instruments commonly used to acquire rights in land usually include necessary easements that are incidental to renewable energy development, such as:

- rights of access, ingress and egress;
- rights to commit nuisance;
- rights to construct and maintain electrical transmission facilities; and
- other customary rights incidental to renewable energy development.

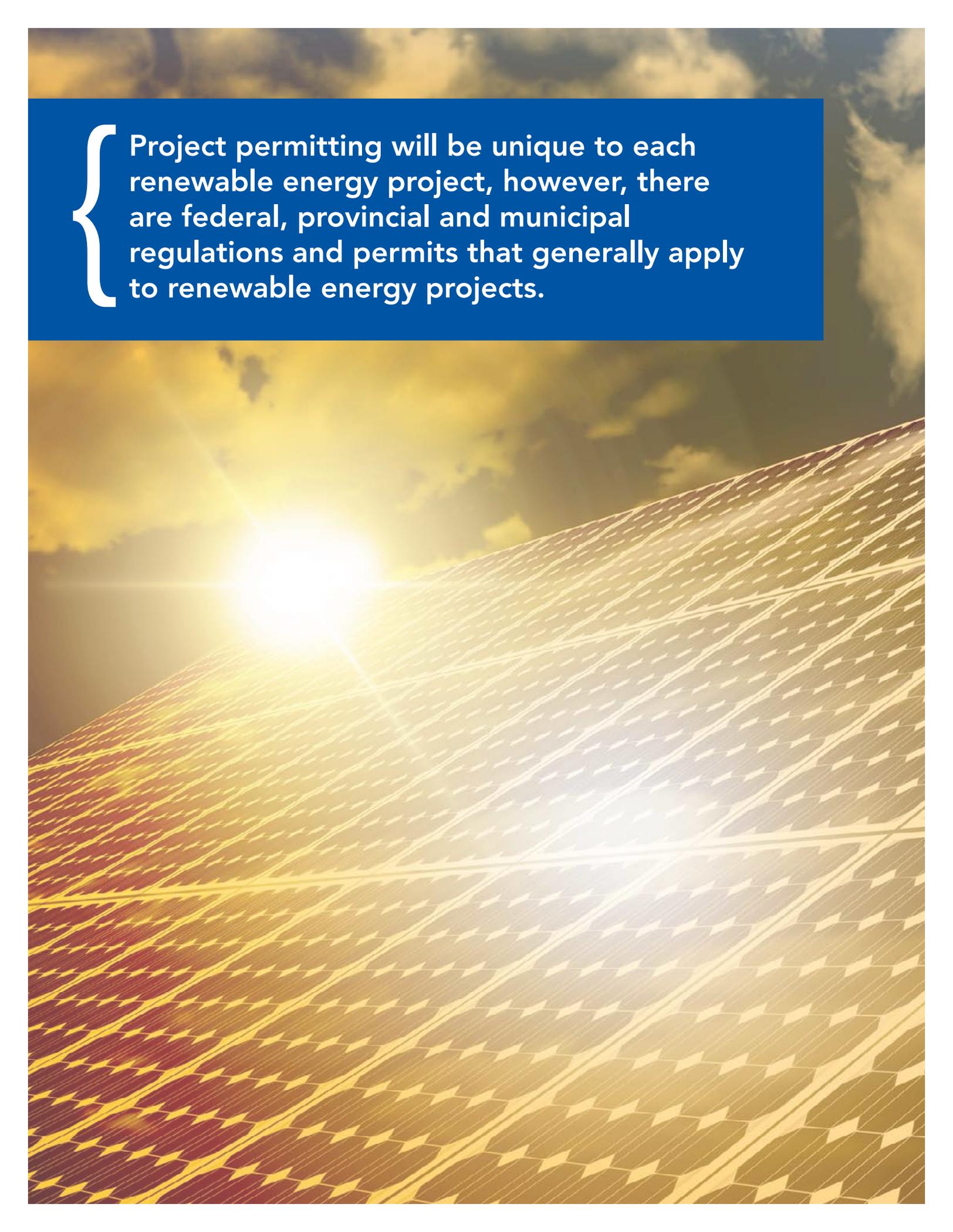
Easements require careful consideration to ensure validity, enforceability and the creation of an incorporeal hereditament.

In Saskatchewan to create a valid easement capable of registration in the Saskatchewan Land Titles Office, there must be a dominant and servient tenement, the easement must accommodate the dominant tenement and the easement must be capable of being granted (i.e. not vague or ill-defined). In the context of renewable energy development, independent power producers may lack sufficient rights in land to establish a dominant tenement and careful project planning is required. More specifically, an easement requires two parcels of land. Conversely, statutory easements only require one parcel of land. Except for limited statutory exceptions (for example, statutory liens established pursuant to *The Power Corporation Act*, *The Saskatchewan Telecommunications Act*, *The Public Utilities Easement Act*, *The Cities Act*

or The Municipalities Act), Saskatchewan does not recognize easement in gross – that is, an easement not requiring a dominant tenement or appurtenant land. If the common law requirements of an easement are absent, the grant is merely a licence not rising to an incorporeal hereditament.

For certain renewable energy projects, it may be necessary to develop electrical transmission and distribution facilities outside of the project area – that is, the area that has been acquired by lease, option to lease or other instrument – to enable the independent power producer to interconnect to SaskPower’s existing electrical transmission and distribution facilities. Pre-development consideration of the rights in land required by private developers is critical as in Saskatchewan there is no legislative grant of expropriative power to independent power producers. For private developers, easements are secured through negotiation of an agreement with the property owners.

Developers will also want to assess location and access to municipal or provincial rights of way relating to road allowances, roads, streets or lanes vested in the Crown in right of Saskatchewan. As is described in further detail on page 23 of this [Overview of Renewable Energy Development in Saskatchewan](#), independent power producers may apply to the Ministry of Highways and Transportation for a permit pursuant to *The Highways and Transportation Act, 1997* to construct and install electrical collection or transmission systems in municipal or provincial rights of way.



Project permitting will be unique to each renewable energy project, however, there are federal, provincial and municipal regulations and permits that generally apply to renewable energy projects.

DEVELOPMENT CONSIDERATIONS



PROJECT PERMITTING

Project permitting will be unique to each renewable energy project, however, there are federal, provincial and municipal regulations and permits that generally apply to renewable energy projects. These regulatory requirements will vary depending on the renewable energy source – wind, solar, hydro, geothermal and biomass – project size, location and other affect resources. This [Overview of Renewable Energy Development in Saskatchewan](#) provides a general summary of regulatory permits applicable to wind energy projects undertaken in the Saskatchewan.

Federal
Aeronautics Act, Canadian Aviation Regulations and Radiocommunications Act
Wind energy development will likely require early-stage consultation with Transport Canada, NAV Canada and Industry Canada to determine the requirements for, and if applicable obtain, permits under the ***Aeronautics Act, Canadian Aviation***

Regulations and Radiocommunications Act.
Depending on the siting of the wind energy project, it may be necessary to submit an Aeronautical Assessment Form for Obstruction Marking and Lighting to Transport Canada. Similarly, early-stage consultation with NAV Canada will likely be required as it may be necessary to submit a Land Use Submission Form to NAV Canada. These forms allow each of Transport Canada and NAV Canada to ensure a wind energy project does not interfere with commercial, agricultural or reactional air traffic and, if necessary, establish mitigation steps to reduce such interference, including setbacks and safety markings or lightening. While the probability of application is low in the context of wind energy development, it may be necessary to engage in early-stage consultation with other federal authorities such as Fisheries and Oceans Canada. Pursuant to the ***Fisheries Act***, Fisheries and Oceans Canada authorization is required if wind energy development may cause serious harm to fish.

Provincial

The Heritage Property Act

By *The Heritage Property Act*, land may be formally designated by a municipality or the Province as heritage property. This designation grants the land public recognition and legal protection by requiring the heritage interest to be registered in the Saskatchewan Land Titles Registry. The Saskatchewan Ministry of Parks, Culture and Sport may also regulate alterations to the land in order to safeguard those elements that embody the site's heritage value. In connection with environmental assessment activities, independent power producers will conduct a desktop review utilizing an online screening tool to determine whether land is or may be a heritage property. If land is or may be a heritage property, the project is submitted to Saskatchewan Ministry of Parks, Culture and Sport – Heritage Conservation Branch for a determination. If the development is likely to disturb or damage heritage property then the Ministry of Parks, Culture and Sport – Heritage Conservation Branch may require an impact assessment study, submit an assessment report and any further salvage, preservation measure, or other action deemed appropriate.

Following a determination, an Impact Assessment Investigation Permit is issued and assessment undertaken. If the land is not a heritage property, then no permit is required under *The Heritage Property Act*.

The Water Security Agency Act

It is highly probable that a wind energy development will require an Aquatic Habitat Protection Permit issued by the Saskatchewan Ministry of Environment or the Saskatchewan Water Security Agency pursuant to *The Environmental Management and Protection Act, 2010* and *The Water Security Agency Act*. Any work that occurs in a bed, bank or boundary of a watercourse, or any discharge that affects water, requires an Aquatic Habitat Protection Permit.

In the context of renewable energy development, an Aquatic Habitat Protection Permit is generally required in connection with road developments and water conveyance projects such as channel clearing, channelization, wetland infilling/drainage, existing drainage ditch maintenance and construction of new ditches.

The Highways and Transportation Act, 1997

Wind energy development will require permitting pursuant to *The Highways and Transportation Act, 1997*. Under *The Highways and Transportation Act, 1997* the Minister of Highways and Transportation has control over utility construction within or along a public improvement (which is inclusive of any road allowance or a road, street or lane vested in the Crown in right of Saskatchewan). Additionally, without a permit, there is a general prohibition to erect, excavate, bury, or cause to be erected, excavated, or buried any building, structure, lighting device, reflecting device, embankment, dugout, well or other excavation within the prescribed distance from the surveyed limit of a provincial highway.

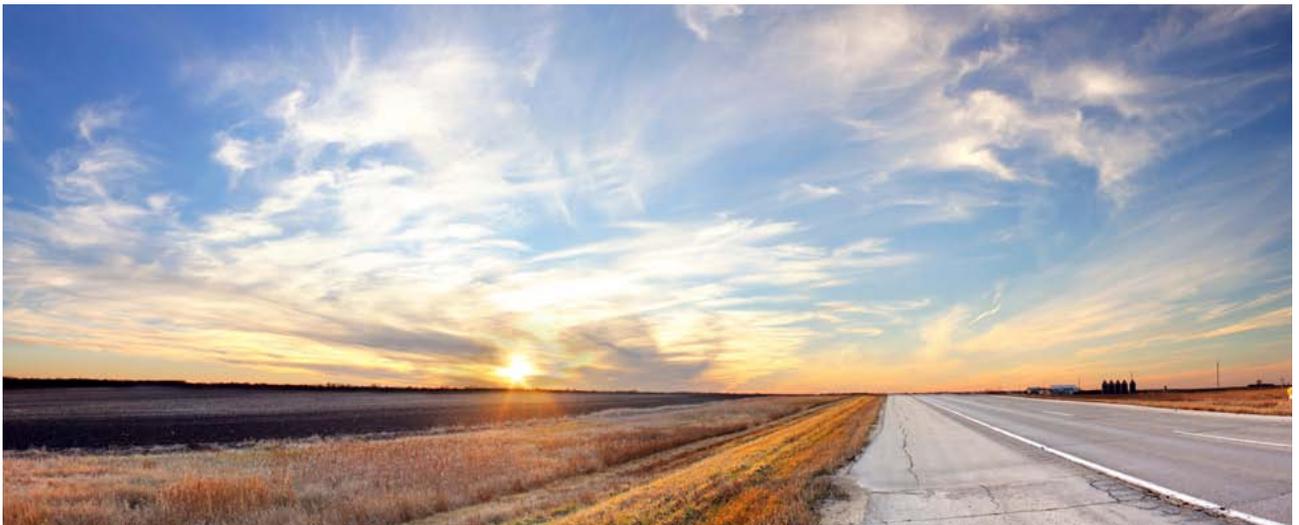
Applications will be required for approaches, roadside development (usually within 90 meters of the surveyed limit of a provincial highway) and utility development within or along provincial highway. Specific to utility development, a developer must complete a Utility Permit Application and submit it with the following documents to obtain a permit to construct within a right of way:

- 3 copies of a route plan (unless submitting electronically);
- 3 copies of a plan consisting of engineered drawings showing the

design, materials, specifications and the precise location of the utility (unless submitting electronically);

- a construction schedule including the exact date and location for the commencement of construction and the completion date;
- written consent or approval of each municipality if the facility is being placed in the right of way of a municipal highway (that is, all roadways except provincial highways);
- proof of insurance (general liability insurance in respect of injury to or death of persons, or loss or damage to property, in an amount of not less than \$2,000,000 (two million dollars) per occurrence).

Among other conditions, the developer will be required to indemnify the Government of Saskatchewan, its Ministries, Ministers, officers, representatives and employees. In addition to the above, it may be necessary to secure easements from property owners adjacent to the municipal rights of way. For private developers, easements are normally secured through negotiation of an agreement with the property owners and the developer. Unlike the Government of Saskatchewan, or its crown corporations, developers do not have expropriation power.



Municipal

In Saskatchewan, *The Planning and Development Act, 2007* enables Saskatchewan municipalities to address local land use and development issues through the adoption of an official community plan and zoning bylaw. Where wind-source energy is abundant (particularly south western Saskatchewan), many municipalities have zoning bylaws which contemplate wind turbine development as a discretionary use for land zoned agriculture. As a discretionary use, it will be necessary to make an application to council to permit the discretionary use in accordance with the applicable zoning bylaw. In addition to the general requirements regarding discretionary use applications, some bylaws have expressed development standards for wind turbines with prescribed setback requirements and prescribed consultation areas, requiring a professional engineering certificate, or prohibiting wind turbines if problems such as visual or audio interference with neighbouring persons and properties can be demonstrated.

Developers are advised to discuss their project with a municipality's council and administrator prior to making an application in order to

minimize delays. Councils and administrators are generally willing to provide assistance, information, and help solve any potential problems saving time and potential costs. As wind turbine developments are generally discretionary uses, the development permit application must be advertised pursuant to *The Planning and Development Act, 2007* and presented to the council for review and decision. Developers should request time on the agenda if they wish to present information on behalf of their development application and should be prepared for involved and rigorous public participation.

Where a development permit application is refused, the municipality is required to provide reasons why the application was refused and did not satisfy the criteria, if applicable, outlined within the zoning bylaw. In the case of a discretionary use, an applicant may generally not appeal a refusal, but may appeal conditions of an approval.

Following receipt of a development permit, many municipalities also restrict construction with a building permit issued in accordance with applicable bylaws.

CLOSURE



This *Overview of Renewable Energy Development in Saskatchewan* provides a broad overview Saskatchewan's legal and regulatory landscape as it relates to renewable energy development. Stakeholders are encouraged to engage experienced legal, environmental and engineering professionals to consider project-specific issues and the application of Saskatchewan's legal and regulatory framework.

McKercher LLP would welcome the opportunity to assist you with your current and proposed business activity in Saskatchewan. Our lawyers have been proudly serving Saskatchewan for over 90 years and in that time have developed intimate knowledge of Saskatchewan industry sectors, the Saskatchewan Government and Crown corporations and the Saskatchewan legal and regulatory landscape.



Christopher J. Masich
Senior Associate, McKercher LLP
(306) 664-1356
c.masich@mckercher.ca



Saskatchewan



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SASKATOON

374 Third Avenue South
Saskatoon, SK S7K 1M5
(306) 653-2000 F (306) 653-2669

REGINA

800 - 1801 Hamilton Street
Regina, SK S4P 4B4
(306) 565-6500 F (306) 565-6565